



# United States Department of the Interior

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## Memorandum

To: State Director, Bureau of Land Management

From: Regional Solicitor, Alaska

Subject: Kandik, Nation Decision on Navigability

The recent ANCAB decision in Appeal of Doyon, Ltd., ANCAB RLS 76-2 holding that the Kandik and Nation Rivers are navigable is an important new precedent by which Departmental determinations of navigability under ANCSA must be guided. It should be viewed as modifying and amplifying but not as nullifying preexisting Departmental guidelines, notably the "Garner Memorandum" of March 16, 1976. The purpose of this memorandum is to summarize the principal holdings of the ANCAB decision and to indicate the extent to which it changes the prior guidelines.

### I. Summary of ANCAB Decision

The Board's decision reiterated for the most part the principles set forth in the "Garner Memorandum" with one significant exception. The Garner Memorandum states "water sufficient only for use by small flat bottomed trapping or sport fishing boats or small canoes is not navigable." The Board found that historic use of a waterbody by trappers while it will not necessarily prove that the river is usable as a highway of commerce, it may be considered as evidence of such use for navigability purposes. The Board further specifically found that "pole boats, tunnel boats, and outboard [motor] river boats constituted the customary modes of trade and travel in the tributaries of the Middle Yukon area" and that such small flat bottomed boats may be considered as evidence of the rivers' susceptibility as a highway of commerce. Since the evidence presented was largely confined to trappers using these flat bottomed boats, the conclusion cannot be avoided that in the context of the "Middle Yukon Tributaries" rivers capable of floating these boats are navigable - not because trapping is commerce (the Board carefully avoided such categorical statement), but because it is evidence of "susceptibility."

The remaining significance of the decision is that it provides a concrete factual context in which to illustrate and amplify the abstract legal principles set forth in the Garner Memorandum. Although the principles themselves were not disputed, the Board's application of them was a significant departure from BIM's previous practice, in that the Kandik and Nation Rivers, which during periods of low water may have as little as three inches of water flowing over the gravel bars, were held navigable from their junction with the Yukon to the Canadian Border, which is a considerable distance upstream from the area at issue in the appeal. The Board's decision also stressed the fact that susceptibility - not historical use - would be the main determinant of navigability in Alaska. The following discussion uses the topical headings of Section IV of the Garner Memorandum to amplify the principles stated therein.

A. Natural and Ordinary Condition of the Water Course

The waters must be usable by the customary modes of trade or travel on water. This rules out use of the river in its frozen state as a trail for vehicles or dog teams. Neither the Kandik or Nation Rivers had been altered by man to facilitate navigation except to the extent of cutting occasional sweepers or logjams.

B. Highways of Commerce

Navigability of a river is not tested by the volume of commerce carried but the extent to which the commerce carried relates to the needs of the locality which the river serves. The waterbody must be useful as a highway for travel and transportation in the local area. If the evidence shows that there was a clear need for commercial transportation in the area and that the need was met by an alternative to waterborne commerce, this indicates that the waterbody is not navigable.

The Board noted that although use of the Kandik and Nation Rivers was sparse, given the isolation and economics of the region, the extent of use was surprisingly heavy and that the rivers were prime means of transportation.

C. Commercial Craft

The Board again emphasized the importance of the local conditions in finding that commercial craft in the Middle Yukon area include the type of river boats testified to. The Board quoted approvingly from the Administrative Law Judge's recommended decision a statement that these boats were "capable of carrying 1,000 lbs. of freight." Elsewhere in the opinion the Board states that the Kandik and Nation Rivers "may ... constitute the outside limit of navigation for useful commerce."

The use of boats for "private" noncommercial purposes such as trapping, hunting, recreation and subsistence does not necessarily establish navigability. Such use may, however, clearly establish that the waterbody is susceptible of being used as a highway for commerce, i.e., is navigable. As the Board stated in its decision:

The Board notes that if the type of watercraft used for recreation is capable of carrying a commercial load, and is commonly used to do so, then use of such watercraft offers some indication that the waterway is capable of being used for the purpose of useful commerce.

If "commercial vessels" have been used on a waterbody for such "private" purposes, this indicates that the waterbody is "susceptible" to use as a highway for commerce, i.e., navigable.

It is safe to conclude that conditions in the Middle Yukon area are similar to those throughout much of Alaska. Accordingly, until the guidelines are further revised, flat bottomed boats capable of carrying 1,000 lbs. of freight should be considered the lower limit of commercial river crafts.

#### D. Seasonal Variation

The Board's decision noted the fact that the water level in both rivers was subject to fluctuation and that in periods of low water only several inches of water flowed over the gravel bars (p. 21). This was held not a bar to navigation. Nor does the fact that the rivers are frozen for seven months of the year preclude a finding of navigability.

#### E. Accessibility.

In order to be navigable, a waterbody must be so situated as will enable it to accommodate the public generally as a means of transportation. Lack of commercial development or lack of human settlement in the area does not, in itself, make a waterbody non-navigable. However, this coupled with physical inaccessibility or other factors suggesting that commercial development or human settlement is not likely to occur, might indicate nonnavigability. This so-called "proximity test" is more easily stated by negative example: a land locked lake in the middle of nowhere which has sufficient depth to float commercial vessels but which has no history of commercial use and because of its location and inaccessibility is not likely to have any is not navigable. One court postulated a lake "above timberline and near the top of a 10,000 foot mountain peak [to which it is]

almost a hands and knees climb to get to ..." Monroe v. State, 175 P. 2d 759, 762 (Utah 1946). The court concluded "to hold it to be a navigable body of water would be an oddity to say the least. Sailing that lake, one would get nowhere fast." Id.

## II. Interrelationship of Factors.

It is important to emphasize that all factors must be examined in relation to each other. The test for navigability as explained in the Board's decision, requires that all the factors and considerations be taken together and viewed as a whole, to determine whether a given waterbody is navigable or not. Since the issue is essentially a factual one, each waterbody must be examined and evaluated in the context of the local geographic and factual setting.

It is also important to keep in mind that historic use is not essential for a river to be navigable. Susceptibility of use must be determined as an independent basis for navigability. It is well to reiterate the legal test for navigability adopted by the Board from United States v. Holt State Bank, 270 U.S. 49, 56 (1925):

The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had - whether by streamboats, sailing vessels or flatboats - nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce. \* \* \*

In applying this legal test to the Nation and Kandik Rivers, ANCANB emphasized that navigability is primarily a factual issue in which several factors must be examined and evaluated. The Board expressly declined "to define in precise, checklist fashion the requirements for navigability of a body of water." The Board's opinion, however, does provide some general guidelines which should be used by the BLM in determining navigability.

## III. Scope of Investigation

In order to make a navigability determination, it is necessary to examine (a) the historic use by boats of the waterbody, (b) the

physical characteristics of the waterbody, (c) the general characteristics of the locality and its historic development. The following list describes the type of information which should be compiled by the BLM District Office.

A. Historic Use of Boats on Waterbody


1. Uses made of the waterbody by boats. (e.g., use for mining, trapping, hunting, recreation; travel between communities; freighting supplies; etc.)
2. Types of boats used on the waterbody.
3. The typical size of the load carried by the boats on the waterbody.
4. Any alternate routes of access and transportation available or which have been used.

B. Physical Characteristics of the Waterbody

1. Any physical improvements made at any time in order to facilitate navigation.
2. The nature and frequency of any physical impediments or obstructions which make the use of boats difficult or impossible (steep, gradient, waterfalls, shallows, rapids, etc.).
3. The physical characteristics of the waterbody that allow it to accommodate the use of boats (e.g. depth, width, length or area).
4. Accessibility of the waterbody (e.g., shoreline characteristics of land-locked lake; river flowing through deep canyon.)
5. Any other significant physical features. (e.g., unusual seasonal variations, known measurements of discharge, etc.)

C. General Characteristics of Locality

1. Settlements or communities in the area, if any.
2. Type of economic development which has occurred in the locality. (e.g., mining, exploration, logging, trapping, etc.)
3. Needs of the local population that could be served by waterborn commerce and/or by other means of transportation.

  
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